Nestra Plantations Sdn Bhd v Fadzillah bt Abd Rahman & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-02(IM)(NCVC)-684–04 OF 2014
ABANG ISKANDAR, VARGHESE GEORGE AND NALLINI PATHMANATHAN JJCA
7 JUNE 2016

Companies and corporations — Winding up — Receivership — Company wound up — Affairs and property in hands of liquidator/official receivership — Unlawful issuance and registration of new shares causing unlawful appointment of directors — Allegation that company under receivership — Whether new shares could be issued — Whether solicitor validly appointed — Whether solicitor had authority and/or sanction from official receivership to act for wound up company — Whether necessary sanction obtained by solicitor

The appellant ('the first plaintiff') was wound up and its affairs and property were in the hands of the liquidator/official receiver ('OR'). One deceased Mohamad ('the first defendant') was a shareholder in the first plaintiff and had unlawfully caused the issue and registration of new shares in the fifth respondent ('the fifth defendant') in favour of the second respondent ('the second defendant') and the third respondent ('the third defendant'). This resulted in the second and third defendants being unlawfully appointed as directors of the fifth defendant. Through the OR, the first plaintiff filed a suit against all the defendants for, inter alia, a declaration that (a) the appointment of the second and third defendants as the directors was unlawful and be revoked; and (b) the issue and registration of shares in the fifth defendant in favour of the second and third defendants was unlawful and ought to be revoked. According to the OR, the company was under receivership and therefore, no new shares could be issued. The solicitors in action at that time was Messrs Wan Jawahir & Co who obtained sanction from the OR to act on behalf of the plaintiff. A firm known as Messrs Ahmad Rastom & Nayagam took over the matter from Messrs Wan Jawahir & Co. Messrs Ahmad Rastom & Nayagam then entered into a consent order with the defendants in which it was consented that a sum of RM2.3m from the balance of purchase price from a sale of the oil palm estate owned by the fifth defendant was to be paid to the second plaintiff, and the balance of the sale and purchase price of approximately RM14.5m was to be paid to the second and third defendants. Nothing was allocated to the first plaintiff. This new firm of Messrs Ahmad Rastom & Nayagam also agreed to withdraw the main suit of the first plaintiff without liberty to file afresh. Dissatisfied with the new solicitor's action, the first plaintiff through their new solicitor, Messrs Mohamed, Jargit & Partners filed an application for a declaration that Messrs Rastom & Nayagam had no

sanction or authority to act for the first plaintiff and also applied to set aside the consent order. The High Court dismissed both the first plaintiff's applications. Hence, the present appeal. The issue that arose was whether Messrs Ahmad Rastom & Nayagam who had purportedly acted for the first plaintiff, was validly appointed in the sense that did they have the authority and/or sanction from the OR to act for the first plaintiff.

Held, dismissing the appeal:

(1) The sanction from the OR must be given to a specific solicitor to act accordingly. It was not open to the prior sanctioned solicitor to simply discharge himself and then appoint another solicitor to further act in his place without the new solicitor having first obtained the requisite sanction of the OR. It was not shown that he had the authority from the OR to aver that crucial fact regarding the status of Messrs Ahmad Rastom & Nayagam (see paras 13 & 23).

(2) As a government agency dedicated to deal with matters on insolvency and its attendant ramifications, such the need for sanction by an undischarged bankrupt, any information pertaining to the issuance or otherwise of a sanction must emanate from the Jabatan Insolvensi Malaysia. The facts in this case did not exhibit such a situation. Even assuming that the OR could outsource to a private individual to aver to such a fact on its behalf, in the circumstances of this case, there was nothing that adverted to that fact. Despite having written to the OR, Messrs Ahmad Rastom & Nayagam had not received any response from the OR. As such, the status of the said firm could only be determined directly by the necessary averment to that effect by the OR. The evidence could not forward the appellant's case any further in discharging the burden on it of proving that the said legal firm had not obtained the necessary sanction to act the way it did. Taken in the light of the totality of the available evidence on the issue of sanction, it was merely a bare assertion without more (see para 23).

[Bahasa Malaysia summary

Perayu ('plaintif pertama') digulung dan hal ehwalnya dan hartanah adalah dalam tangan likuidator/pegawai penerima ('PP'). Si mati yang bernama Mohamad ('defendan pertama') adalah pemegang saham di dalam plaintif pertama dan telah salah dari segi undang-undang menyebabkan isu dan pendaftaran saham baru di dalam responden kelima ('defendan kelima') memihak responden kedua ('defendan kedua') dan responden ketiga ('defendan ketiga'). Ini menyebabkan defendan kedua dan ketiga salah dari segi undang-undang dilantik sebagai pengarah defendan kelima. Melalui PP, plaintif pertama memfailkan tindakan terhadap kesemua defendan bagi, antara lain, perisytiharan bahawa (a) pelantikan defendan kedua dan ketiga sebagai pengarah adalah salah dari segi undang-undang dan dibatalkan;

dan (b)isu dan pendaftaran saham di dalam defendan kelima memihak defendan kedua dan ketiga adalah tak sah dan patut dibatalkan. Mengikut PP, syarikat adalah di bawah kuasa penerima dan oleh itu, tiada saham baru yang boleh dikeluarkan. Peguamcara dalam tindakan pada masa tersebut adalah Tetuan Wan Jawahir & Co yang memperolehi sanksi daripada PP untuk bertindak bagi pihak plaintif. Firma yang dikenali sebagai Tetuan Ahmad Rastom & Nayagam mengambil alih perkara tersebut daripada Tetuan Wan Jawahir & Co. Tetuan Ahmad Rastom & Nayagam kemudiannya memasuki perintah izin dengan defendan-defendan di mana ia diberikan izin bahawa jumlah RM2.3 juta daripada baki harga belian daripada jualan estet kelapa sawit yang dimilik oleh defendan kelima hendaklah dibayar kepada plaintif kedua, dan baki jualan dan harga belian lebih RM14.5 juta adalah dikehendaki dibayar kepada defendan kedua dan ketiga. Tidak terdapat apa-apa yang diagihkan kepada plaintif. Firma baru Tetuan Ahmad Rastom & Nayagam ini juga bersetuju untuk menarik balik tindakan utama plaintif pertama tanpa kebebasan untuk memfailkan yang baru. Tidak berpuas hati dengan tindakan peguamcara baru, plaintif pertama melalui peguamcara baru mereka Tetuan Mohamed, Jargit & Partners memfailkan permohonan bagi perisytiharan bahawa Tetuan Rastom & Nayagam tidak mempunyai sanski atau kuasa untuk bertindak bagi plaintif pertama dan juga memohon untuk mengetepikan perintah izin. Mahkamah Tinggi menolak kedua-dua permohonan plaintif pertama. Maka rayuan ini. Isu yang berbangkit adalah sama ada Tetuan Ahmad Rastom & Nayagam yang bertindak untuk plaintif pertama, adalah dilantik secara sah dalam maksud bahawa mereka mempunyai kuasa dan/atau sanksi daripada PP untuk bertindak bagi plaintif pertama.

Diputuskan, menolak rayuan:

(1) Sanksi daripada PP mesti diberikan kepada peguamcara khas untuk bertindak selanjutnya. Ia tidak terbuka kepada peguamcara yang disanksikan sebelumnya dengan ringkas membebaskan dirinya dan kemudiannya melantik peguamcara lain untuk bertindak selanjutnya bagi pihaknya tanpa peguamcara baru memperolehi terdahulu sanksi PP yang diperlukan tersebut. Ia tidak ditunjukkan bahawa dia mempunyai kuasa daripada PP untuk menegaskan fakta penting berkaitan status Tetuan Ahmad Rastom & Nayagam (lihat perenggan 13 & 23).

(2) Sebagai agensi Kerajaan yang diserahkan untuk berurusan dengan perkara mengenai insolvensi dan kesannya, keperluan sedemikian untuk sanksi oleh bankrap yang tidak menjelaskan hutang, apa-apa maklumat berkaitan penerbitan atau sebaliknya terhadap sanksi mesti berpunca daripada Jabatan Insolvensi Malaysia. Fakta kes ini tidak menunjukkan keadaan sedemikian. Walaupun dengan menganggap bahawa PP boleh alih daya kepada individu persendirian untuk menegaskan kepada fakta sedemikian atas pihaknya, dalam keadaan kes ini, tidak terdapat apa-apa yang merujuk kepada fakta tersebut. Meskipun telah menulis kepada PP,

Tetuan Ahmad Rastom & Nayagam tidak menerima apa-apa jawapan daripada PP. Dengan itu, status firma tersebut hanya boleh ditentukan secara terus oleh hujahan yang perlu oleh PP. Keterangan tidak boleh memajukan kes perayu selanjutnya dalam melepaskan beban ke atasnya dengan membuktikan bahawa firma undnag-undang tersebut tidak memperolehi sanksi yang perlu untuk bertindak dalam cara ia bertindak. Berdasarkan keseluruhan keterangan yang ada atas isu sanksi, ia hanya pengegasan sia-sia tanpa lebih (lihat perenggan 23).]

Notes

For cases on receivership, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1931–1932.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (folld)

Appeal from: Civil Suit No 22NCVC-03–01 of 2012 (High Court, Kuala Terengganu)

Harpal Singh Grewal (Jargit Singh and Reny Rao with him) (Mohamed, Jargit & Partners) for the appellant.
Mohd Azhar bin Awang (Ahmad Rastom & Nayagam) for the first respondent.
Gunaseelan (Asmawati Ab Manaf with him) (Zahir Razak & Co) for the second to fifth respondent.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] Nestra Plantation Sdn Bhd ('the first plaintiff') was wound up and its affairs and property are in the hands of the liquidator/official receiver ('OR').

[2] Mohamad bin Awang (deceased/ 'the first defendant') was a shareholder in the first plaintiff and one of the directors in Lemo Sdn Bhd ('the fifth defendant'). The first defendant was adjudicated bankrupt on 15 December 1993.

[3] The fifth defendant is a private limited company which was under receivership under a debenture held by Bank Pertanian Bhd. The fifth defendant is the owner of an oil palm estate in Terengganu. The original shareholders in the fifth defendant were the first plaintiff and the estate of one Leong Wan Yin.

[4] The first defendant, while still an undischarged bankrupt, had unlawfully caused the issue and registration of new shares in that fifth defendant in favour of the Khuzamy Musa bin Muhammad ('the second defendant') and Khuzairy Musa bin Muhammad ('the third defendant'), and subsequently caused the second and third defendant to be unlawfully appointed as directors of the fifth defendant.

[5] Through the OR, the first plaintiff filed a suit against all the defendants for among other, a declaration that the appointment of the second defendant and the third defendant as the directors of the fifth defendant was unlawful and be revoked. The first plaintiff also sought for a declaration that the issue and registration of shares in the fifth defendant in favour of the second and the third defendants was unlawful and ought to be revoked.

[6] The basis of the OR's claim was that, among others, the issuance of new shares to the second and the third defendants in the fifth defendant was unlawful and illegal because the company was under receivership and under the circumstances, no new shares could be issued.

[7] The solicitors in action at that time was Messrs Wan Jawahir & Co who obtained sanction from the OR to act on behalf of the plaintiff.

[8] On 12 May 2012, a firm known as Messrs Ahmad Rastom & Nayagam took over the matter from Messrs Wan Jawahir & Co.

[9] Messrs Ahmad Rastom & Nayagam then entered into a consent order (dated 7 October 2012 and 29 July 2012) with the defendants in which it was consented that a sum of RM2.3m from the balance of purchase price from a sale of the oil palm estate owned by the fifth defendant was to be paid to the second plaintiff, and the balance of the sale and purchase price of approximately RM14.5m was to be paid to the second and third defendant. Nothing was allocated to the first plaintiff. This new firm of Messrs Ahmad Rastom & Nayagam also agreed to withdraw the main suit of the first plaintiff without liberty to file afresh.

[10] Dissatisfied with the new solicitor's action, the first plaintiff through their new solicitor, Messrs Mohamed, Jargit & Partners filed an application for a declaration that Messrs Rastom & Nayagam had no sanction or authority to act for the first plaintiff vide encl 46A and also applied to set aside the consent order, vide encl 46B.

[11] On 23 March 2014, the High Court dismissed both the first plaintiff's applications in encl 46A and encl 46B. Now, before us the first plaintiff appealed against the said decision of the High Court.

A THE APPEAL

[12] In this appeal, the issue raised by the appellant/first plaintiff has been: whether Messrs Ahmad Rastom & Nayagam who had purportedly acted for the appellant/first plaintiff, was validly appointed in the sense that did they B have the authority and/or sanction from the OR to act for the appellant/first plaintiff.

[13] On the face of it, ipso facto, the answer to the question may appear to be C straightforward. It was observed by the learned trial judge, and we think rightly so, that the sanction from the OR must be given to a specific solicitor to act accordingly. It was not open to the prior sanctioned solicitor to simply discharge himself and then appoint another solicitor to further act in his place without the new solicitor having first obtained the requisite sanction of the D OR.

[14] The factual matrix in this case as could be seen above had adverted to the complaint by the appellant that Messrs Ahmad Rastom & Nayagam who had taken over the case from Messrs Wan Jawahir & Co did not have the E required sanction to so act from the OR. It was a simple allegation, which, if it was proven to be so, would have seen its application in encl 46A being granted by the learned trial judge.

[15] It had transpired that in order to prove that Messrs Ahmad Rastom & F Nayagam had not obtained the required sanction from the OR, the appellant had produced the affidavit one Ahmad Fauzi Abdul Rahman affirmed on 16 January 2014. In fact, this was the affidavit in support of the application in encl 46A that was filed on the complaint of nonsanction. Such averment had G appeared at para 8 of the said affidavit in support where he had affirmed as followed:

> (8) Saya oleh itu dinasihatkan oleh peguam plaintif pertama iaitu Peguamcara Tetuan Mohamed, Jargit & Partners dan sesungguhnya percaya bahawa Perintah Persetujuan bertarikh 7/10/2012 dan perintah bertarikh 21/7/2013 dan Penghakiman Persetujuan bertarikh 29/7/2013 adalah nullities terutamanya H apabila Tetuan Ahmad Rastom & Nayagam telah kononnya menarik balik tindakan Plaintif Pertama terhadap semua Defendan-Defendan dengan melupuskan dan melucutkan hak legitimate, hak Plaintif Pertama dan tuntutan terhadap kesemua Defendan tanpa sebarang sanksi atau kebenaran daripada Pelikuidasi dan memasuki Penghakiman Persetujuan bagi pihak Plaintif Kedua I dengan jumlah RM2,300,000 sedemikian menjejaskan hak kepentingan Plaintif Pertama.

[16] The same averment was again reiterated in paras 4 and 7 of the 'affidavit balasan plaintif pertama' dated 29 January 2014. Paragraph 4 therein had read

as follows: '4) Menjawab kepada perenggan 6 Afidavit tersebut, saya mengulangi dan mengesahkan bahawa pegawai penerima hanya melantik dan memberi sanksi/kebenaran kepada Tetuan Wan Jawahir & Co dan tidak pernah memberi sebarang sanksi/kebenaran kepada Tetuan Ahmad Rastom & Nayagam untuk mewakili plaintif pertama ataupun mengambilalih kes ini daripada Tetuan Wan Jawahir & Co, sedemikian pengambilan alih kes ini kononnya Tetuan Ahmad Rastom & Nayagam daripada Tetuan Wan Jawahir & Co dan kononnya pemfailan notis penukaran peguamcara bertarikh 12/5/2012 adalah tanpa pengetahuan pegawai penerima dan pelikuidasi plaintif pertama dan tidak sah sama sekali'.

[17] In para 7 of the same affidavit by Ahmad Fauzi, it was stated in the following terms:

> (7)(a) Menjawab perenggan 9(a) Afidavit tersebut saya mengulangi dan mengesahkan bahawa Pegawai Penerima dan Pelikuidasi plaintif Pertama tidak pernah memberi keizinan, sanksi/kebenaran kepada Tetuan Ahmad Rastom & Nayagam untuk mengambil alih kes ini daripada Tetuan Wan Jawahir &
>
> Co untuk mewakili Plaintif Pertama.

[18] Learned counsel for the respondents had objected by saying that there was nothing in the affidavit to show that the deponent Ahmad Fauzi bin Abdul Rahman had been authorised by the OR to affirm the affidavit alluding to such a material fact, on his behalf. All his averments to that effect were based on the advice he had received from his counsel. His objection was expressed quite emphatically in paragraph of the afidavit jawapan dated the 22 January 2014, by Khuzamy Musa bin Muhammad, the second defendant in the action, where he had averred:

> 14. Saya sekeras-kerasnya menegaskan di sini bahawa mana-mana Perenggan Afidavit Sokongan Plaintif Pertama yang tidak diakui secara nyata di sini adalah dianggap dinafikan sekeras-kerasnya dan Plaintif Pertama dikehendaki memberikan bukti yang kukuh terhadapnya.

[19] It would therefore require this court to look at the evidence that was led in court by the plaintiff in order to establish that indeed there had been no sanction given by the OR.

[20] As regards encl 46B, its genesis had close nexus with the issue of whether the legal firm who negotiated for the consent order that had binding effect on the appellant had obtained the necessary sanction from the OR. If the answer was in the negative, then the consent order would be a *nullity ab initio* and could be set aside. But that would depend on the proof of the fact that the legal firm of Messrs Ahmad Rastom & Nayagam was not properly clothed with the necessary sanction by the OR.

[21] It was the contention of the appellant that as the Messrs Ahmad Rastom & Nayagam was not sanctioned by the OR, it could not act on behalf of the respondents. The law, it was submitted before us was clear in that such act must be held to be a nullity and void *ab initio,* and if a court order was found to be illegally obtained on such account, it must be struck down. The case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 ('*Badiaddin* case') was cited in support by the appellant.

[22] Now, before the postulated question above could be answered, there was really a crucial fact that needed to be addressed. And that would be whether indeed the legal firm of Messrs Ahmad Rastom & Nayagam was not given the sanction by the official assignee. The facts showed that the said legal firm did in fact send letters to the official assignee for the necessary consent. The said firm had sent two letters to the official assignee dated 4 April 2012 and 8 May 2012 to Jabatan Insolvensi Malaysia purportedly requesting that it be allowed to continue from the Wan Jawahir sanction dated 28 December 2011. However there was no reply from the official assignee. As time was fast running out, the said firm proceeded to file notice of appeal on 12 April 2012 and had so proceeded henceforth for the first respondent in the various actions. As against this, the appellant had filed encl 46A. The supporting affidavit thereto was affirmed by one Ahmad Fauzi bin Abdul Rahman on 16 January 2014 who at the material time was a shareholder of the appellant to the tune of 0.0001% (or two shares only). As alluded to above, in his affidavit, he had averred to the effect that the said legal firm of Messrs Ahmad Rastom & Nayagam had not obtained any sanction from the OR. In his afidavit balasan dated the 29 January 2014 he had repeated averments to similar effect. In both the affidavits affirmed by the said Ahmad Fauzi, no documents of any kind emanating, as it were, from the Jabatan Insolvensi Malaysia, were annexed thereto, that would tend to lend credence to his averments.

[23] The respondents had taken umbrage to that averment and argued that as that fact was within the knowledge of the OR, only the latter could state such averment. In this case, it was not shown in the affidavit by Ahmad Fauzi that he had the authority from the OR to aver that crucial fact regarding the status of Messrs Ahmad Rastom & Nayagam in relation to the sanction issue, on its behalf. With respect, we agreed with the submission by learned counsel for the respondents that there was merit in that argument. As a government agency dedicated to deal with matters on insolvency and its attendant ramifications, such the need for sanction by an undischarged bankrupt, any information pertaining to the issuance or otherwise of a sanction must emanate from the Jabatan Insolvensi Malaysia. The facts in this case before us did not exhibit such a situation. Even assuming that the OR could outsource to a private individual to aver to such a fact on its behalf, in the circumstances of this case, there was nothing in the affidavit of Ahmad Fauzi having adverted to that fact. We had

also borne in mind that despite having written to the OR, Messrs Ahmad Rastom & Nayagam had not received any response from the OR. As such, we were with the respondents that the status of the said firm could only be determined directly by the necessary averment to that effect by the OR. The evidence as it stood as per the affidavit in support by Ahmad Fauzi could not forward the appellant's case any further in discharging the burden on it of proving that the said legal firm had not obtained the necessary sanction to act the way it did. Taken in the light of the totality of the available evidence on the issue of sanction, it was merely a bare assertion by Ahmad Fauzi, without more.

[24] On that score alone, this appeal ought to fail. There was no evidence coming from the appellant before the court that the firm of Messrs Ahmad Rastom & Nayagam had not obtained the necessary sanction from the OR. In the cited case of *Badiaddin* it was also held that a court order, however imperfect, would remain valid and enforceable until it is set aside. We reproduce here the speech of the learned Justice Gopal Sri Ram JCA (as he then was) as follows:

> (7) As a general rule, orders of a court of unlimited jurisdiction may not be impugned on the ground that they are void in the sense that they may be ignored or disobeyed. However, it is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected.

[25] So, an impugned order will remain good until it is properly impeached by a competent court and set aside. Having said that, we were of the view that there was nothing to prevent the appellant from starting a writ action to prosecute its case against the respondents for the reliefs that it had sought for, if it so wished. In the same case of *Badiaddin* Justice Gopal Sri Ram had gone on to say:

> But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in *proceedings brought for that purpose.* It is then entirely open to the court, *upon the illegality being clearly shown,* to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal. (Emphasis added.)

[26] As a matter of reiteration, the appellant in this appeal had not shown as a matter of clear and positive averment and proof that the legal firm of Messrs Ahmad Rastom & Nayagam had not obtained the necessary sanction from the OR. We were of the view that there was merit in what was adverted to in para 10 of the affidavit in reply dated 22 January 2014 where it was averred that the complaint directed at the matter of sanction, which was premised on an allegation of illegality, ought to have been pursued as a new action by way of a

writ, instead of as an off-shoot of an existing main cause of action. In light of the rather murky state of affairs pertaining to that factual circumstance, a writ action, where, inter vivos, evidence would be the order of the day, may well be the better mode to ventilate this contentious matter.

[27] As regards to encl 46B, in the factual matrix of this case, it was shown to us that there was no valid evidence to establish that factual circumstance asserted by the appellant before the court. As such, encl 46B was rightly dismissed by the learned High Court judge, albeit on a different premise. Its success was dependent upon the issue of sanction as well.

CONCLUSION

[28] In the upshot, we therefore dismissed the appeal against the decision of the learned judge of the High Court. We saw no reason to disturb his findings thereto. As alluded to above, the appellant would be at liberty to file a fresh action by way of writ, if it so wished. We had awarded costs of RM7,500 to the first respondent, and RM7,500 to the second to fifth respondents, globally. We had so ordered.

Appeal dismissed.

Reported by Afiq Mohamad